Office-Supreme Court, U.S.
FILED
AUG 17 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2116

In the Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM ARCHIE WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether petitioner's "check kiting" scheme came within the reach of 18 U.S.C. 1014.

2. Whether the district court abused its discretion in excluding a series of exhibits and accompanying testimony proffered by petitioner.

3. Whether the district court erroneously instructed the jury on weighing petitioner's testimony.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statute involved	2
Statement	3
Argument	5
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Carrigan v. *United States*, 405 F.2d 1197, cert. denied, 396 U.S. 1028	13
Cupp v. *Naughten*, 414 U.S. 141	12
Miller v. *Poretsky*, 595 F.2d 780	11
Reagan v. *United States*, 157 U.S. 301	11, 12, 13
Taylor v. *United States*, 390 F.2d 278, cert. denied, 393 U.S. 869	13
United States v. *Edwards*, 455 F.Supp. 1354	7
United States v. *Hernandez*, 588 F.2d 346	12
United States v. *Hill*, 470 F.2d 361	12
United States v. *Payne*, 602 F.2d 1215, cert. denied, 445 U.S. 903	5, 6
United States v. *Reid*, 410 F.2d 1223	13
United States v. *Saletko*, 452 F.2d 193, cert. denied, 405 U.S. 1040	13
United States v. *Sher*, 505 F.Supp. 858, appeal docketed, No. 81-1317 (3d Cir. Feb. 27, 1981)	7
United States v. *Stoddart*, 574 F.2d 1050	6

Statutes and rule:

Act of June 25, 1948, ch. 645, 62 Stat. 752	6
18 U.S.C. 656	3, 7
18 U.S.C. 1014	2, 3, 5, 6, 7, 8
18 U.S.C. 2311	6
Fed. R. Evid. 403	8

Miscellaneous:

F. Whitney, *The Law of Modern Commercial Practices* (1965)	6

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2116

WILLIAM ARCHIE WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported at 639 F.2d 1311.

JURISDICTION

The judgment of the court of appeals (Pet. App. A22) was entered on March 19, 1981. A petition for rehearing was denied on April 17, 1981 (Pet. App. A23-A24). The petition for a writ of certiorari was filed on June 13, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 1014 provides:

> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, any Federal intermediate credit bank, or any division, officer, or employee thereof, or of any corporation organized under sections 1131-1134m of Title 12, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank Board, the Home Owners' Loan Corporation, a Federal Savings and Loan Association, a Federal land bank, a joint-stock land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, any member of the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Administrator of the National Credit Union Administration, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or

otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

STATEMENT

After a jury trial in the United States District Court for the Western District of Louisiana, petitioner was convicted on one count of misapplying bank funds, in violation of 18 U.S.C. 656 (Count I), and two counts of "check kiting," in violation of 18 U.S.C. 1014 (Counts II and III). He was sentenced to six months' imprisonment on Count III and five years' probation on Counts I and II. The court of appeals affirmed (Pet. App. A1-A21).

The evidence at trial is recounted in the opinion of the court of appeals (Pet. App. A3-A7). It showed that in 1975 petitioner purchased the majority interest in the Pelican State Bank in Pelican, Louisiana, and promptly appointed himself bank president (*id.* at A3). For several years prior to petitioner's assumption of control of Pelican Bank, the bank had maintained a so-called "dummy account," which was used to pay checks drawn on the bank by customers who had insufficient funds in their individual checking accounts to cover their obligations. A check would be paid from the bank's general assets and held in the dummy account until the customer had deposited sufficient funds to cover the check. At this point, the check would be posted to the customer's account and the figure for accumulated checks in the dummy account would be correspondingly reduced. The bank charged no interest for providing this service. *Id.* at A4.

As controlling shareholder and bank president, petitioner enjoyed unhindered personal use of the

dummy account. By May 2, 1978, total overdrafts attributable to him amounted to $58,055.44, more than 50% of the total overdrafts then covered by the dummy account. On May 9, 1978, petitioner deposited in his personal checking account at Pelican Bank a check for $58,500 drawn upon his checking account at Winn State Bank, Winnfield, Louisiana. This sum far exceeded his actual balance in Winn Bank. Pelican Bank thereupon credited petitioner's checking account for the face amount of the deposited check, at the same time posting to his account the group of checks that he had drawn prior to May 2 and that had been cleared through the dummy account. Pet. App. A4-A5.

On May 10, 1978, petitioner deposited in his checking account at Winn Bank a check for $60,000 drawn on his personal checking account at Pelican Bank. The sum far exceeded his balance in the drawee bank. Winn Bank credited his account for the face amount of the check, and subsequently routinely paid the $58,500 check given to Pelican Bank on May 9, when it cleared for payment on May 12, 1978. Pet. App. A6.

On May 11, 1978, the $60,000 check that petitioner had deposited in Winn Bank the day before was presented for payment at Pelican Bank. Because petitioner had insufficient funds to cover the check in his Pelican account, Pelican cleared the check through the dummy account. Pet. App. A6.

On May 16, 1978, petitioner deposited in his checking account at Pelican Bank a check for $65,000 drawn upon his combined personal and business checking account at Sabine State Bank, Many, Louisiana. His actual balance, once more, was far less than this sum. Pelican Bank credited his checking account for the face amount of the check and, at the same

time, posted to his checking account the $60,000 check that he had deposited in Winn Bank on May 10 and that had been cleared through the dummy account on May 11. Pet. App. A6.

Because of insufficient funds in petitioner's account, Sabine Bank refused to make payment on the $65,000 check. Pelican Bank subsequently charged petitioner's account accordingly. Petitioner neutralized the charge-back by depositing a $65,000 money order in his Pelican account the same day. Pet. App. A6-A7.

As a result of the above activity, petitioner was able to obtain for his personal account at Pelican Bank interest-free credit of $58,000 from May 9, 1978 to May 12, 1978, and of $65,000 from May 16, 1978 to May 23, 1978. In addition, he was able to obtain interest-free credit of $60,000 at Winn Bank from May 10, 1978 to May 11, 1978. Pet. App. A7.

ARGUMENT

1. Petitioner contends (Pet. 23-26) that his "check kiting" scheme did not come within the reach of 18 U.S.C. 1014. First, he argues (Pet. 23-25) that a check is not a "security" within the meaning of the statute. He further argues (Pet. 25-26) that even if a check is a security, it is not "overvalued" within the meaning of the statute so long as it represents an "enforceable obligation." The court of appeals correctly rejected these claims.

As petitioner recognizes (Pet. 23), a check was held to be a "security" in *United States* v. *Payne*, 602 F.2d 1215, 1218 (5th Cir. 1979), cert. denied, 445 U.S. 903 (1980). Petitioner argues that this construction is nonetheless contrary to Section 1014's legislative history, which, in his view, suggests an

intent to limit the statute's application to frauds arising from the pledging of collateral for an extension of credit. He correctly notes that the statute, as originally enacted, was a compilation of 13 earlier laws primarily concerning misrepresentation to government agencies responsible for making farm and home loans, transactions usually involving collateral. See Act of June 25, 1948, ch. 645, 62 Stat. 752. But in 1970 Congress expanded the scope of Section 1014 to include false applications to banks and similar institutions insured by either the FDIC or the FSLIC. As the court of appeals in *Payne* concluded, quoting *United States* v. *Stoddart*, 574 F.2d 1050, 1053 (10th Cir. 1978), "[t]he statute therefore proscribes * * * '*all undertaking*[*s*] which might subject the FDIC insured bank to risk of loss' " (602 F.2d at 1219; emphasis added).[1]

Furthermore, petitioner's checks were "overvalued" under Section 1014. Although it is true that a check is an enforceable obligation, in giving a check " 'the drawer impliedly represents that he has on deposit with the drawee banks funds equivalent to the face amount of the check.' " *United States* v. *Payne*, *supra*, 602 F.2d at 1218, quoting F. Whitney, *The Law of Modern Commercial Practices* § 341 (1965). Here, petitioner contrived to obtain credit by falsely representing that his checks were worth their face value. As the court of appeals correctly concluded (Pet. App. A19-A20), 18 U.S.C. 1014 makes such conduct a federal crime.

---

[1] We note that in 18 U.S.C. 2311, relating to stolen property, a "security" is specifically defined to include "any * * * check * * *."

In the absence of a conflict among the circuits on the proper construction of Section 1014, review of the issue by this Court is unwarranted.[2]

2. Petitioner contends (Pet. 14-23) that the district court improperly excluded certain exhibits and accompanying testimony relevant to the issue of his intent to defraud Pelican Bank under 18 U.S.C. 656.

At trial, petitioner attempted to negate the intent element of Section 656 by showing that at all pertinent times he maintained credits at the bank that exceeded his drawings upon the dummy account. Petitioner's theory, as outlined by his counsel in an initial proffer to the trial court (Tr. 147-150, 153-154, 158-160),[3] was that Pelican Bank had decided in November 1977 to terminate its commitment to finance the purchase of General Motors cars and trucks by Taylor Motor Company, and that petitioner had personally made payments totalling some $79,000 to General Motors for previously ordered cars delivered to Taylor, thereby aiding the bank, as guarantor, with money that otherwise could have covered his under-funded checks in May. The payments were allegedly evidenced by money orders purchased with cash and corresponding promissory notes signed by Taylor Motor Company and made payable to Pelican Bank. Petitioner's counsel did not represent that petitioner's name was on any of the notes or money orders; he stated (Tr. 160) that evidence of peti-

[2] Two district court decisions have adopted petitioner's reading of Section 1014. *United States* v. *Edwards*, 455 F. Supp. 1354 (M.D. Pa. 1978); *United States* v. *Sher*, 505 F. Supp. 858 (W.D. Pa. 1981), appeal docketed, No. 81-1317 (3d Cir. Feb. 27, 1981).

[3] "Tr." refers to the transcript of the trial.

tioner's role could be established "possibly" by testimony from Jessie Bridges, who was associated with Tayor Motor Company, and Ollie Stone, a vice-president of Pelican Bank, and by petitioner's own testimony.

The trial court, applying Fed. R. Evid. 403, found (Tr. 152, 165) that the probative value of this evidence on intent to injure the bank was outweighed by its tendency to mislead and confuse the jury,[4] but it permitted counsel to have the testimony recorded by the court reporter, "after the jury has retired at the end of this trial," to be used for "whatever purpose you make of it" (Tr. 167).

Despite the trial court's rejection of the proffer, petitioner in fact put on a defense regarding the alleged payment of bank-guaranteed obligations on behalf of Taylor Motor Company. He testified (Pet. App. A11) that prior to the events in question, Pelican Bank had entered into an agreement with General Motors to finance the purchase of new cars by Taylor Motor Company, a local car dealership. He further testified (Pet. App. A11-A12) that when Pelican subsequently terminated the financing relationship in November 1977, he undertook to advance Pelican whatever funds would be necessary to meet Pelican's obligation on cars still in transit or already delivered. According to petitioner, the bank's total indebtedness to him amounted to $77,000 by May 9, 1978, as a result of his undertaking (Pet. App. A12). He also testified that in May 1978, at the time of the sale of Taylor Motor Company, he had received $60,000 in payment of his prior advances for the company and,

---

[4] The proffered evidence had no possible relevance to the two Section 1014 counts, as petitioner's counsel conceded during the trial (Pet. App. A15 n.6; Tr. 154, 155). Intent to defraud is not an element of an offense under Section 1014.

under the "guidance" of "Mr. Womack," the attorney who was handling the sale for the company, purchased a $60,000 money order made out to him and to Pelican Bank, which he thereafter delivered to Ollie Stone, Pelican Bank's vice-president (Tr. 177, 196-200). He testified (Tr. 198-200, 201) that he thought the money should have been credited to his account but that it was, instead, used to "pa[y] off some cars" for the company.

Stephen Roberts, a certified public accountant who appeared as a witness for petitioner, testified (Tr. 252-256) that he had examined certain documents showing cash purchases of money orders by an unknown source on four separate occasions between December 19, 1977, and March 15, 1978, used to pay obligations to General Motors for automobiles sent to Taylor Motor Company; they totalled some $56,000. He linked one payment to petitioner on the basis of a handwritten notation on a ledger card supplied to him by petitioner's counsel (Tr. 254-255, 257-258). He also testified (Tr. 256) that he had examined promissory notes made out to the bank and signed by Taylor Motor Company corresponding to those payments.

Ollie Stone, the Pelican Bank vice-president, testified in rebuttal for the government, and petitioner declined the opportunity to cross-examine him (Tr. 287), even though this would have presented an opportunity to challenge Stone's testimony (Tr. 285) that the Pelican Bank at no time owed petitioner any money. Jessie Bridges, who was familiar with the sale of Taylor Motor Company, testified for the government that at no time had the company owed petitioner any money (Tr. 299-300).

Petitioner's subsequently recorded proffer, presenting testimony by Ollie Stone and accountant Roberts, is, as the court of appeals correctly concluded (Pet.

App. A14), in large part "needlessly cumulative." [5] The proffered evidence did not reveal the answer to the critical question—the identity of the source of the individual cash injections to which the accountant had testified at trial (see Supp. Tr. 24) (admission by accountant that he did not know source of the funds).[6]

In sum, the trial court correctly concluded, on the basis of counsel's representations, that the tendency of extensive evidence of transactions involving the Taylor Motor Company to confuse the jury out-

---

[5] The excluded exhibits previously offered by petitioner in support of his argument that his credits at Pelican Bank at all relevant times exceeded his withdrawals from the dummy account consisted of: (1) a letter from Pelican Bank to General Motors informing the latter that Pelican Bank no longer intended to finance the purchase of new cars by Taylor Motors; (2) several promissory notes from Taylor Motors to Pelican Bank; (3) a number of bank money orders, dating from December 1977 to March 1978, evidencing total payments during this period of $56,393.87 from Taylor's account at Pelican Bank to General Motors, and (4) miscellaneous documentation relating to Taylor's new car purchases in November and December of 1977 and their financing by Pelican Bank (Pet. App. A13-A14).

[6] "Supp. Tr." refers to the transcript of the recorded proffer. Because petitioner's counsel did not explain to the trial court, *before* the ruling on the proffer, exactly what he expected Ollie Stone to say in his testimony, and because he failed to use the opportunity to cross-examine Stone at trial on his testimony that petitioner was not a creditor of the Pelican Bank, Stone's vague reference (Supp. Tr. 8) to petitioner's possible payment of a single money order for the benefit of Taylor Motor Company does not bear the weight petitioner ascribes to it (Pet. 20).

Petitioner offered no testimony from Womack, the attorney who, according to his trial testimony, had overseen the payment to him of $60,000 from the proceeds of the sale of Taylor Motor Company (see page 9, *supra*).

weighed the probative value of the evidence on the question of petitioner's intent to defraud the bank through the check kiting scheme by which he received interest-free extensions of credit. Permitting petitioner to explore, at much greater length than he did, the details of the documents relating to the promissory notes, money orders, and correspondence between the bank and General Motors, would have, as the court of appeals observed (Pet. App. A14), "cluttered [the record] with numerous details of business transactions only tangentially related to the question of [petitioner's] overdrafts." [7]

3. In its final charge to the jury, the district court gave the following instruction (Tr. 313):

> You have heard the testimony of William Archie Williams. In weighing his testimony, you can consider his keen personal interest in the outcome of the trial. If you feel that this interest is sufficient to affect the defendant's credibility then—[o]f course—[y]ou are free to reject his testimony. But, remember, you may not reject his testimony merely because William Archie Williams is the defendant in this matter.

Relying primarily on *Reagan* v. *United States*, 157 U.S. 301 (1895), petitioner contends (Pet. 7-14) that this instruction was reversible error.

In *Reagan*, this Court upheld an instruction that "[t]he deep personal interest which [the defendant] may have in the result of the suit should be considered

---

[7] Because petitioner in fact introduced evidence (the testimony of accountant Roberts) corroborating his own testimony and had the opportunity to seek to adduce corroborating evidence from Ollie Stone on cross-examination, this case is distinguishable from *Miller* v. *Poretsky*, 595 F.2d 780 (D.C. Cir. 1978), on which petitioner heavily relies (Pet. 16, 18, 23).

t the jury in weighing his evidence and in determining how far or to what extent, if at all, it is worthy of credit." 157 U.S. at 304. See also, upholding similar instructions, *United States* v. *Hernandez*, 588 F.2d 346, 349-350 (2d Cir. 1978); *United States* v. *Hill*, 470 F.2d 361, 363-364 (D.C. Cir. 1972). Petitioner argues that the decision below conflicts with *Reagan*, first, because the jury here was effectively instructed to "disregard the defendant's testimony" (Pet. 9). But this was simply not the case. Rather, the jury was told that it "*can*" consider petitioner's interest in the outcome of the case, and that it was "*free* to reject his testimony" if it "fe[lt]" that his interest affected his credibility (Tr. 313; emphasis added). Indeed, at the conclusion of the instruction, the court reminded the jury that it should not reject petitioner's testimony merely because he was the defendant in the case.

Petitioner further argues that the decision in this case conflicts with *Reagan* because the jury here was not instructed that petitioner's interest in the outcome was only " 'a circumstance to be considered in weighing his testimony * * *' " (Pet. 9, quoting *Reagan*, *supra*, 157 U.S. at 306). Reading the instruction as a whole, however (see *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973)), the jury was so instructed. Just before giving the challenged instruction, the district court informed the jury (Tr. 312) of the various factors involved in weighing the credibility of a witness, including his relationship to a party, his interest in the case, his demeanor, his knowledge of the facts about which he testified, his candor and intelligence, and the extent to which his testimony was corroborated or contradicted by other evidence. While the challenged instruction may have emphasized the

factor of the defendant's interest in the outcome, it did not exclude the other factors from the jury's consideration. Accordingly, the district court here did precisely what this Court found unobjectionable in *Reagan*: "[i]n the first part [of its credibility instruction] it la[id] down a general rule, applicable to all circumstances, and then in the latter part [it] simply call[ed] attention to the fact that the defendant ha[d] a deep personal interest in the result of the suit, and that that should be considered by the jury." 157 U.S. at 311.[8]

As petitioner points out (Pet. 10-11), some courts of appeals have expressly criticized "credibility" instructions that single out for comment the defendant's interest in the case. See, *e.g.*, *United States* v. *Saletko*, 452 F.2d 193, 197-198 (7th Cir. 1971), cert. denied, 405 U.S. 1040 (1972); *Carrigan* v. *United States*, 405 F.2d 1197, 1198 (1st Cir. 1969), cert. denied, 396 U.S. 1028 (1970); *Taylor* v. *United States*, 390 F.2d 278, 285 (8th Cir.), cert denied, 393 U.S. 869 (1968). However, none of these courts has seen fit to reverse a conviction solely on the basis of the giving of such an instruction.[9]

---

[8] Petitioner also argues (Pet. 13) that the instruction was defective because it permitted the jury to reject his testimony completely even "if his credibility was affected minutely [by his interest in the outcome] * * *." This constitutes an unduly technical and highly unrealistic reading of the instruction, particularly in light of the court's statement to the jury that it could "accept or reject the testimony of any witness in whole or in part" (Tr. 312).

[9] In *United States* v. *Reid*, 410 F.2d 1223, 1227-1228 (7th Cir. 1969), the court held that it was reversible error to instruct the jury on the defendant's interest in the case while refusing an explicit request to instruct it that government witnesses are not entitled to any special credibility by the fact of their office alone.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

AUGUST 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 352382 592